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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 646

FRANK BROWN, *Petitioner*

v.

ROBERT G. SMITH, *Warden*, Vermont State Prison,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Frank Brown, petitioner herein, by his attorneys, prays that a writ of certiorari issue to the Court of Appeals for the Second Circuit to review the decision of that Court in this case.

OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Second Circuit, 306 F.2d 596 (2d Cir. 1962), entered on July 17, 1962, reversing the district court, ordering petitioner's bail revoked, and directing his return to custody, are set forth in Appendix A. The order of the Court of Appeals denying

rehearing en banc, entered October 1, 1962, is set forth in Appendix B. The opinion of the United States District Court for the District of Vermont (Timbers, J.), entered on December 22, 1961, granting petitioner's request for a writ of habeas corpus, is reported at 200 F. Supp. 885 (D. Vt. 1961), and appears at page 369b of Appellant's Separate Appendix B in the court below.

The district court's memorandum of July 27, 1962 and its order of July 30, 1962 regarding petitioner's motion for a stay of its order entered on the mandate of the court of appeals appears at Appendix C. The order of the court below granting a stay for thirty days appears at Appendix D. The order of this Court signed by Mr. Justice Harlan granting an additional stay appears at Appendix E.

JURISDICTION

Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the United States District Court for the District of Vermont. On December 22, 1961, that Court granted the writ on condition and the warden of the state prison appealed.

On July 17, 1962, the United States Court of Appeals for the Second Circuit entered a judgment reversing the district court and directing it to revoke petitioner's bail and to order the United States Marshal to deliver petitioner to the custody of the warden of the state prison.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).[1]

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[1] Both the court below, 306 F.2d 596, 601, and the district court, 200 F. Supp. 885, 924, found that petitioner had exhausted his state remedies. The question will not, therefore, be discussed in this petition.

QUESTIONS PRESENTED

1. Whether the State Prosecutor's public disclosure of petitioner's prior criminal record and the resultant repetition of the disclosure in the press deprived petitioner of a fair trial by an impartial jury in violation of his rights under the Fourteenth Amendment when six of the twelve jurors admitted having read newspaper reports of the case?

2. Whether a Vermont statute regarding the filing of notices of appeal was so unreasonably applied to petitioner as to deny him review of a record raising grave constitutional questions, as well as issues of state law, in violation of his rights under the Fourteenth Amendment?

3. Whether the court below erred in rejecting the district court's findings as "clearly erroneous."

4. Whether the Court of Appeals erred in basing its decision in part on a finding made after an *ex parte* examination of the record that there was ample evidence to support petitioner's conviction?

STATUTE INVOLVED

Section 2241 of the Judicial Code, 28 U.S.C. § 2241, reads in relevant part, as follows:

> "(a) Writs of habeas corpus may be granted by . . . the district courts . . . within their respective jurisdictions . . . .
>
> . . . . . .
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> . . . . . .
>
> (3) He is in custody in violation of the Constitution . . . of the United States . . . ."

STATEMENT OF THE CASE

On July 23, 1959, petitioner was indicted in Windham County, Vermont, for first degree murder,[2] pursuant to Vt. Stat. Ann., Tit. 13 § 501 (1959). At his arraignment in open court on July 27, 1959, he pleaded not guilty. Petitioner thereupon moved for bail.

In support of his motion for bail he called Dr. David Ruml, who testified that petitioner had been his patient for a year or a year and a half; that petitioner had suffered a coronary attack about six or seven months before the hearing; that petitioner had had another heart failure two months before the hearing; and that in his opinion incarceration of petitioner would create additional tension and anxiety that might cause recurrence of such attacks. On cross-examination by the prosecutor, this colloquy took place:

> "Q. Now, Doctor, would it make any difference in your opinion if the individual whom we are discussing, if you learned the individual whom we are discussing had been previously arrested and incarcerated on the following convictions?
>
> Mr. Burgess [petitioner's counsel]: We object to this at this time. We don't see how that could affect the doctor's medical opinion. We think it is highly prejudicial.
>
> Mr. Debevoise [prosecutor]: Your honor, if it can be shown this man spent a good deal of time in jail maybe the doctor will feel he may be more at home than in a hotel room."

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[2] "A person who wilfully and maliciously burns the building of another, or wilfully and maliciously sets fire to a building owned in whole or in part by himself, by means of which the life of a person is lost, shall be guilty of murder in the first degree."

Mr. Burgess: We should also know he had the same medical condition at the time he spent in any institution.

Mr. Debevoise: I think this is a proper question in view of the doctor's opinion. I am asking whether the further fact which he may not have been aware of would change his opinion.

The Court: What do you say about the element of prejudice?

Mr. Debevoise: I think the Court can order the courtroom cleared but I believe this is pertinent to the inquiry under discussion . . . The State should have an opportunity to see if the doctor has all the facts regarding the background.

Court: Why don't you simply ask whether without skirting the element of prejudice? [*sic*].

Mr. Debevoise: You mean without mentioning specific crimes?

Court: Yes.

Q. Would it make any difference to your opinion, Doctor, if it were the fact that on thirty-six different occasions this respondent has been charged with at least one crime?

Mr. Burgess: We again object. We don't see the relativity of what somebody has been charged with on the doctor's medical opinion.

Court: We will take the answer. You may have an exception.

A. No, I don't think it would.

Q. It is six weeks between now and trial. Would it make any difference to your opinion if the respondent on at least eight different occasions spent periods of time longer than six weeks in jail?

A. No. . . ."

In summing up, the prosecutor said to the court:

> "We could call the respondent to the stand in this proceeding but the only purpose would be to go into the part of his criminal record which I have here, just received special delivery from Boston. This is the part when he was in Boston between 1928 and 1944. And I don't want to prejudice the respondent."

On the day following the bail hearing, July 28, 1959, the following appeared as the headline of the lead story in the Brattleboro Daily Reformer, the city's only daily newspaper:

"BROWN HELD FOR ARSON TRIAL IN SEPT.
Bail Denied by Court; Record of 36 Arrests Cited."

In the body of the story appeared the following paragraph:

> "Deputy Atty. Gen. Debevoise asked Dr. Ruml is [*sic*] he would change his opinion if he knew that the respondent had been charged on 36 different occasions with at least one crime and had been sentenced at least eight times to serve longer than six weeks in jail in Massachusetts, according to his Boston criminal record between 1928 and 1944."

On September 4, 1959, petitioner filed a motion for a change of venue, alleging that the widely published disclosure made by the prosecutor and other publicity given the case had prejudiced petitioner. At the hearing on the motion it was established that the Brattleboro Daily Reformer circulated to 90.8% of all families in the town of Brattleboro and to 75.69% of all families within a 25 mile radius of Brattleboro; that the fire and petitioner's alleged involvement had received wide and extensive coverage in the Reformer;

that a Brattleboro radio station with a large listening audience in the area had broadcast a number of similar reports; that in the opinion of an official of the Vermont Bar Association the publicity had definitely created prejudice against petitioner.

Petitioner's motion was denied. It was renewed on October 26, 1959, the day the trial began, but the court again denied a change of venue; in addition, petitioner's challenge to the array was denied.

Forty-seven prospective jurors were examined during the voir dire. Thirty-three of these were excused: 6 on peremptory challenges by petitioner;[1] 3 for cause by petitioner; 3 for cause by the court; and 21 for cause by the State (because of scruples about the death penalty). Of the remaining 14—12 regulars and 2 alternates—the record shows the following facts:

(1) 6 regulars and 2 alternates admitted reading reports of the case in the newspaper. Two of these had also heard reports on the radio, and one of the latter had seen television reports of the case.

(2) 8 regulars were subscribers to or regular readers of the Brattleboro Daily Reformer.

At the conclusion of the trial on November 5, 1959, the jury returned its verdict, finding petitioner guilty of arson causing death and determining that his punishment be life imprisonment. Petitioner was sentenced accordingly on November 24, 1959, and a judgment order was filed December 3, 1959.

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[1] The prosecution and the defense were each permitted 6 peremptory challenges under Vermont law.

On December 2, 1959, petitioner's counsel wrote to the Chief Justice of the Vermont Supreme Court, enclosing a petition requesting that petitioner be granted leave to appeal *in forma pauperis*, that a copy of the transcript from the trial court be furnished at State expense, and that counsel be assigned for the appeal at State expense. On December 15, 1959, counsel was advised in a letter from the Clerk of the Vermont Supreme Court that an appeal *in forma pauperis* was granted, that his assignment as counsel for the appeal was granted, and that the Chief Justice would "seek to make some arrangements with the Attorney General" as to the costs of the transcript.

On December 28, 1959, counsel wrote to the Clerk of the Windham County Court summarizing the letter of December 15 and formally ordering a copy of the transcript. On December 31, 1959, petitioner mailed a copy of a notice of appeal to the Clerk of the Vermont Supreme Court, enclosing an extra copy for the Clerk of the Windham County Court. He thus thought to satisfy a new Vermont statute requiring that notices of appeal be filed both in the court being appealed to and the court being appealed from.[1] Because December 31 was a Thursday and the following day was New Year's Day, the Vermont Supreme Court did not process the papers until Monday, January 4, 1960. The Clerk of the Supreme Court on that day sent the papers back to petitioner's counsel, explaining that they should have been filed with the Clerk of the Supreme Court for and within the County of Windham, rather than the Clerk of the General Term. On the following day counsel had the notices of appeal delivered to the Clerk of the

[1] Vt. Acts of 1959, No. 261, §§ 46, 47.

Supreme Court for Windham County—who was also the Clerk of the Windham County Court. By the time the notices of appeal were received, however, the Clerk of the Windham County Court had already issued a mittimus directing that petitioner be committed to the State Prison.

On May 3, 1960, the Vermont Supreme Court dismissed petitioner's appeal for lack of jurisdiction. It held that because the 30-day period for filing notices of appeal expired on a Saturday, January 2, 1960, it was extended to January 4, 1960, the next following Monday. Petitioner's notice of appeal was therefore timely in the Vermont Supreme Court, but one day late in the Windham County Court. A petition for reargument was denied on May 27, 1960.

On September 6, 1960, the Vermont Supreme Court dismissed a petition for a new trial.[5]

A petition for a writ of certiorari from this Court to the Supreme Court of Vermont was denied on February 20, 1961.[7]

PRIOR PROCEEDINGS

On July 18, 1961, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Vermont. Judge William H. Timbers was designated to hear the petition, and on Decem-

[5] *State* v. *Brown*, 121 Vt. 459, 160 A. 2d 879 (1960) (4-2 decision). This opinion appears at p. 13b of Appellant's Separate Appendix B in the court below.

[6] *State* v. *Brown*, 122 Vt. 59, 163 A. 2d 845 (1960) (4-1 decision). This opinion appears at p. 45b of Appellant's Separate Appendix B in the court below.

[7] *Brown* v. *Vermont*, 365 U.S. 822 (1961).

ber 22, 1961. Judge Timbers granted the writ subject to the right of the State to retry petitioner or to correct the defects found in the prior proceedings within thirty days. On January 12, 1962, Judge Timbers issued a certificate of probable cause and admitted petitioner to bail. At this time he had been incarcerated for about two and a half years.

The Court of Appeals for the Second Circuit reversed the district court on July 17, 1962, and directed that the order admitting petitioner to bail be revoked and that he be returned to State custody.[8]

After the mandate of the Court of Appeals had been received by the district court, petitioner moved in the district court for a stay of execution. The district court referred the motion to the Court of Appeals after receiving an informal agreement from the State Attorney General that no objection would be raised to petitioner's remaining at liberty until the Court of Appeals acted on a pending petition for rehearing en banc. On October 1, 1962, the Court of Appeals denied rehearing and, with two judges dissenting, rehearing en banc.

On October 8, 1962, the Court of Appeals granted petitioner's motion to recall its mandate and to stay reissuance for 30 days pending application for a writ of certiorari from this Court.[9] On November 8, 1962, Mr. Justice Harlan signed an order staying issuance of the mandate of the court below providing a petition for certiorari was filed on or before December 8, 1962.[10] Petitioner is, therefore, still at liberty on bail.

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[8] *United States ex rel. Brown v. Smith*, 306 F. 2d 596 (1962).

[9] See Appendix C.

[10] See Appendix D.

[11] See Appendix E.

REASONS WHY THE WRIT SHOULD BE GRANTED

This case presents important constitutional issues regarding the role of state prosecutors in the provision of fair and impartial trials in state criminal cases and the application of technical procedural requirements for appeals in state criminal cases where serious constitutional questions are involved. In addition, this case presents serious questions concerning the proper functioning of a federal court of appeals when reviewing the decision of a district court that has been petitioned for a writ of habeas corpus by a prisoner in state custody.

1. The Role of the Prosecutor In Assuring a Fair and Impartial Trial

This Court has held that the failure of a state to afford a criminally accused a fair hearing "violates even the minimal standards of due process." *Irvin* v. *Dowd*, 366 U.S. 717 (1961), and the prosecutor, as the representative of a sovereign whose obligation is to govern impartially, has a duty to insure that a fair hearing is actually provided. *Berger* v. *United States*, 295 U.S. 78 (1935). When state prosecutors have been guilty of gross misconduct in trying a criminal defendant, this Court has not hesitated to grant relief. See *Alcorta* v. *Texas*, 355 U.S. 28 (1957); *Mooney* v. *Holohan*, 294 U.S. 103 (1935).

In federal prosecutions where defendants have claimed to be prejudiced as a result of publicity given their case, federal courts have given added significance to the fact that the prosecutor or the government was the source of the prejudicial information when determining whether relief should be granted. See *United States* v. *Bando*, 244 F. 2d 833, 837-38 (2d Cir.), cert.

denied, 355 U.S. 844 (1957); *Delaney* v. *United States*, 199 F.2d 107 (1st Cir. 1952); *United States* v. *Bonanno*, 177 F. Supp. 106 (S.D.N.Y. 1959); *United States* v. *Dioguardi*, 20 F.R.D. 33 (S.D.N.Y. 1956). Although these cases can be read as instances of federal courts exercising "supervisory" powers over the administration of federal criminal law, they implicitly recognize the basic principle of fairness that the state cannot by its own conduct impair a defendant's chances of receiving a fair trial and then object to procedural remedies designed to repair the damage.

Moreover, the line between those situations in federal courts requiring an exercise of supervisory powers and those in state courts requiring application of the due process standards of the Fourteenth Amendment is extremely vague, and it certainly cannot be drawn to require any lesser standard of impartiality for state prosecutors.

In petitioner's case Judge Timbers found a great many indicia of unfairness and partiality surrounding the trial,[12] but the most serious and prejudicial circumstance was the disclosure of petitioner's prior criminal record by the prosecutor. As Judge Timbers said:

> "[T]he public disclosure of petitioner's alleged criminal record [had a] . . . devastating effect—alone and in combination with other factors—upon petitioner's chances for a fair trial by a panel of indifferent jurors . . ." 200 F. Supp. at 895.

The transcript of the bail hearing reveals clearly that the information disclosed by the Deputy Attorney

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[12] Petitioner does not intend that the other elements of prejudice found by Judge Timbers be abandoned as grounds for reversal in this Court. Rather he intends that they give added significance and gravity to the highly prejudicial disclosure of his prior record.

General was totally irrelevant at the point at which it was raised. It was brought out on cross-examination of petitioner's personal physician, who had testified that incarceration would cause tension and anxiety that might aggravate petitioner's heart condition, a condition that had been recognized for only six or seven months. The alleged criminal record, by the prosecutor's own admission, related to a period of time 18 to 31 years earlier, and was obviously irrelevant to the effect of anxiety and tension on petitioner's present condition.[13] Under Vermont law, evidence of this record could not have been brought out at the trial, even if petitioner had taken the stand and put his credibility in issue.[14] Thus the disclosure in the bail hearing served only to prejudice petitioner. Indeed, the prosecutor's remarks at the time show that he realized the disclosure could prejudice the petitioner.

Although it was impossible on the voir dire to determine with certainty whether prospective jurors were aware of petitioner's record without further preju-

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[13] While this information had conceivable relevance to the likelihood of petitioner's flight while free on bail, it was not brought out for that purpose. Even if it had been, it was the prosecutor's duty to insure that it was not disclosed to the press. Furthermore, it is difficult to see *any* relevance to the prosecutor's disclosure of the number of times petitioner had been *charged* with a crime.

[14] Vt. Stat. Ann. Tit. 12, § 1608 (Supp. 1961). While it may be constitutional for a state to allow the introduction of a defendant's criminal record for purposes other than impeachment, see *Lisenba v. California*, 314 U.S. 219 (1941), *United States ex rel. Thompson v. Price*, 258 F.2d 918 (3d Cir.), cert. denied, 358 U.S. 922 (1958), it should be noted that petitioner's record was not here "introduced" and thus none of the safeguards normally attending judicial proof were applied. See *Marshall v. United States*, 360 U.S. 310 (1959).

dicing petitioner, six of the twelve jurors on the panel, and both alternates, admitted having read reports of the case. One juror stated he had read "whatever was reported by the Reformer." That petitioner was in fact prejudiced was recognized by the court below when it stated: "If this had been a federal trial and jurors had admitted to reading contemporaneous reports of a defendant's criminal record, our supervisory power over the administration of federal justice would *compel* us to reverse." 306 F.2d at 603 (Emphasis added.)[15]

This court has indicated in the past that standards imposed in the federal courts under the supervisory power may be required in the state courts under the Fourteenth Amendment. *Compare McNabb* v. *United States*, 318 U.S. 332 (1943), with *Mapp* v. *Ohio*, 367 U.S. 643 (1961). While it may be true that in some instances the state courts will be held to a lesser standard under due process than the federal courts are under the doctrine of supervisory powers, the disparity between the two must not be a wide one. And certainly where the prosecution itself has exposed a jury to prejudicial publicity there should be no difference between state and federal court standards. This Court has not yet addressed itself to this question[16] and petitioner maintains it is one of utmost importance.

[15] The Court cited *Marshall* v. *United States*, 360 U.S. 310 (1959), in which the jurors had been exposed to reports of the defendant's record.

[16] In *Shepherd* v. *Florida*, 341 U.S. 50 (1951) Mr. Justice Jackson, in a concurring opinion, would have reversed on the ground that the newspapers had reported as a fact, attributing the information to the sheriff, that the defendants had confessed. Persons called as jurors said they had read of this statement, yet no confession was introduced at the trial.

2. The Unreasonable Application of Vermont Procedural Law

This court has not yet held that due process requires a state to provide appellate review of criminal convictions, but it is clear that when appellate review is provided it must be made available on an even-handed basis. *Griffin* v. *Illinois*, 351 U.S. 12 (1956).

Under a Vermont statute enacted only a few months prior to petitioner's conviction a party who wished to appeal had to file a notice of appeal in the court to which he was appealing and the court from which he was appealing within 30 days after notification of the judgment.[17] Thus, petitioner's appeal should have been noted by January 2, 1960. On Thursday, December 31, 1959 petitioner's counsel mailed his notice of appeal to the clerk of the Vermont Supreme Court (General term) in Montpelier, enclosing a copy for the clerk of the Windham County Clerk. Because the next three days were not working days the Supreme Court clerk did not see the notice until Monday, January 4. On that day he returned the notices to counsel with instructions to file them directly with the Windham County clerk, who also served as clerk of the Supreme Court for that county. Petitioner did so on the following day, but the Vermont Supreme Court held[18] that he was one day late as to the county court filing.[19]

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[17] Vt. Acts of 1959, No. 261, §§ 46, 47.

[18] *State* v. *Brown*, 121 Vt. 459, 160 A.2d 879 (1960).

[19] It should be noted that had there not been three non-work days following the original mailing petitioner's problem would not have arisen, since by ordinary mail he would have learned of his error on the final day for filing and could have corrected it. Also: had the Supreme Court clerk in Montpelier mailed the notice to the Wind-

Petitioner contends that however reasonable the Vermont procedural statute may be on its face, it was unreasonably applied to him. He had clearly expressed his intent to appeal in open court, and his counsel, acting pursuant to an official act of the Vermont Supreme Court, had put the trial court on effective notice by ordering a copy of the transcript. Because the notice would have been timely if it had been mailed so as to arrive the day it actually did arrive, it is clear that there was no necessary practical disadvantage to the state or the trial court. Furthermore, the Vermont Supreme Court had never construed the statute, and, as Judge Timbers found, there was confusion among members of the bar as to the proper method of complying with the statute.

This Court has said that due process requires appellate review when due process has been denied at an earlier stage. *Ohio ex rel. Bryant* v. *Akron Park District*, 281 U.S. 74 (1930). It has also refused to treat harsh or highly technical applications of procedural rules as adequate state grounds that would foreclose decision of constitutional questions in the federal courts. *Davis* v. *Wechsler*, 263 U.S. 22 (1923); *Rogers* v. *Alabama*, 192 U.S. 226 (1904).

Petitioner contends that in a capital case raising serious constitutional claims the unreasonable application of this technical procedural rule deprived him of the

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ham County clerk instead of to petitioner it would have been timely, since mailing suffices for filing. Similarly, if petitioner's counsel had mailed the notice to the county court clerk on Monday, January 4, it would have been timely even though it would not have been received until the day it was actually received in this case.

opportunity of appellate review," in violation of the due process and equal protection clauses of the Fourteenth Amendment. Because the statute was repealed as a result of petitioner's experience,[20] his is the only capital case—indeed the only case—in which it has been so applied.[21]

3. The Court Below Erred In Holding the District Court's Findings of Fact "Clearly Erroneous"

It is the duty of a district judge to "summarily hear and determine the facts," 28 U.S.C. § 2243, when presented with a petition for a writ of habeas corpus by a prisoner alleging he is in custody in violation of the U.S. Constitution. His findings, moreover, "shall not be set aside unless clearly erroneous." Fed. R. Civ. P. 52 (a). The court below stated that because the district judge took no testimony and there were no issues of credibility, it was free to draw its own conclusions on the record before it, and it thereupon rejected as "clearly erroneous" Judge Timbers' finding that petitioner had been tried by a jury lacking the impartiality required by the Fourteenth Amendment.

The presence of an issue of credibility is not the only consideration in giving weight to the findings of a district judge. See 5 Moore, Federal Practice ¶ 52.03[1], at 2616 (2d ed. 1951). Indeed, the Advisory Commit-

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[20] While petitioner has had his federal claims reviewed in the federal courts, he never had the opportunity of having full review of his state claims in the light of his federal claims. An allegation that the trial court abused its discretion in refusing change of venue would take on added weight in the light of a charge of an unconstitutional denial of a fair trial.

[21] Vt. Stat. Ann. tit. 12, §§ 2382, 2383 (Supp. 1961). Review of capital cases is now mandatory and automatic.

tee on the Civil Rules proposed an amendment to rule 52(a) in 1955 to "show definitely that the 'clearly erroneous' test is not modified" by the language referring to credibility "but is applicable in all cases." See 5 Moore, Federal Practice ¶ 52.01[7] (2d ed. 1951, Supp. 1961).

In the instant case, although Judge Timbers took no testimonial evidence he had the benefit of four days of adversary argument on the record produced in the trial court and on exhibits submitted at the hearing which he conducted. As his lengthy and thorough opinion shows, he was completely conversant with all of the evidence bearing on the issue of the partiality of the jury. He conducted the hearing in Brattleboro, the town where the fire took place, and was thus in a position to evaluate the evidence in the very setting in which it was generated. It was his finding that given the circumstances of the trial—the exposure of jurors to publicity concerning petitioner's criminal record and other publicity attending the case, the method in which the voir dire was conducted, the admissions of the jurors who were actually selected, testimony presented at the change of venue hearing—petitioner was not tried by an impartial, indifferent jury. Judge Timbers also put great weight on the fact that in a separate civil suit by the owners of the building petitioner is alleged to have burned against their insurance companies, a Vermont jury drawn from a different county found in a special verdict that the fire was not of incendiary origin.

A long line of cases has established that a strong presumption exists in favor of the trial court's findings. 5 Moore, Federal Practice ¶ 52.03[1] at 2616 (2d ed. 1951). Moreover, at the least if the evidence would support a conclusion either way, it is not "clearly erro-

neous" for the district judge to choose between two permissible views of the weight of the evidence. *United States* v. *Yellow Cab Co.*, 338 U.S. 338 (1949).

The treatment of this case by the court below poses great problems for district judges sitting in habeas corpus cases, and this Court should make clear the proper division of responsibilities between lower federal courts in such cases.

4. The Impropriety of the Court of Appeals' Ex Parte Examination of the Record

At the close of its opinion reversing the action of Judge Timbers, the court below made the following statement:

> "From a study of the record, including a reading of the minutes of the trial, it seems to us unlikely that there was any substantial *claim* of error in the conduct of the State trial. Moreover, there was *ample* evidence to sustain Brown's conviction." 306 F. 2d at 606 (Emphasis added.)

Petitioner submits not only that the Court of Appeals erred in concluding that there was no substantial *claim* of error and that there was sufficient evidence to support the conviction, but also that it was grossly improper for the court to examine the record of the case for this purpose. Judge Timbers recognized the impropriety of such an examination in his exhaustive opinion:

> "In complying with the mandate of the United States Supreme Court to search the records of the state court proceedings and independently to evaluate the voir dire examination for the purpose of determining whether the petitioner was tried by a jury of sufficient impartiality to comply with constitutional due process standards, the Court has endeavored scrupulously to refrain from re-

viewing the record from the standpoint of appellate error, that being exclusively a state court function under our federated system. . . . It is not the province of a federal court in a habeas corpus proceeding involving the legality of detention of a state prisoner to determine whether error was committed by the state courts." 200 F. Supp. at 906.

The facts that petitioner was denied appellate review in the Vermont Supreme Court and that he had no opportunity to brief or argue in the Court of Appeals, the questions which the court decided in the above-quoted passage made this action of the court below even more inappropriate. This is particularly so in view of the fact that the Court of Appeals rejected the findings of the district court as "clearly erroneous" and substituted conclusions drawn from its own review of the state record. It is impossible to determine to what extent the court's judgment with regard to the partiality of the jury may have been affected by its conclusion that there was "ample" evidence to support the conviction.

Insufficiency of the evidence, moreover, was one of several substantial claims of error that petitioner made in seeking review by the Vermont Supreme Court. In addition petitioner charged that the trial court abused its discretion in refusing to grant a change of venue and made substantial charges of error relating to the admission of certain evidence and the charge to the jury.[22]

By reviewing the evidence on the merits of petitioner's case in the state trial court and by evaluating peti-

[22] The claims of error are detailed in petitioner's requests for a new trial, which appear at pp. 6c and 49c of Appellee's Appendix C in the court below, and in the transcript of the hearing on the first such motion, appearing at p. 8c of that document.

tioner's claims of error to the Vermont Supreme Court, the court below was apparently applying a "harmless error" rule. Petitioner contends that such review is not appropriate in a habeas corpus case. Furthermore, if this court should decide that such review *is* appropriate the case should be remanded to the district court for argument on this issue and findings by the district judge.

CONCLUSION

For the reasons stated the writ should be granted.

Respectfully submitted,

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Of Counsel

December 8, 1962

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 351—September Term, 1961.
(Argued May 3, 1962 Decided July 17, 1962.)

Docket No. 27418

UNITED STATES OF AMERICA *ex rel.* FRANK BROWN,
Petitioner-Appellee,

v.

ROBERT G. SMITH, Warden, Vermont State Prison,
Respondent-Appellant.

Before:

LUMBARD, *Chief Judge,*
WATERMAN and FRIENDLY, *Circuit Judges.*

Appeal from an order of the United States District Court for the District of Vermont, William H. Timbers, *J.*, granting Brown's petition for a writ of habeas corpus and conditionally releasing Brown from Vermont's custody under a life sentence for arson causing death.

Reversed.

JOHN S. BURGESS, Brattleboro, Vermont (Henry F. Black, White River Junction, Vermont and Robert H. Gibson, Brattleboro, Vermont, on the brief), *for petitioner-appellee.*

THOMAS M. DEBEVOISE, Woodstock, Vermont (Charles J. Adams, Attorney General, State of Vermont, Montpelier, Vermont, on the brief), *for respondent-appellant.*

LUMBARD, *Chief Judge:*

The State of Vermont and the warden of its prison appeal from an order of the district court granting the discharge of Frank Brown on a writ of habeas corpus for the State's "failure to accord petitioner a fair trial by a panel of indifferent jurors plus the denial of state appellate review" in violation of his constitutional rights after his sentence in the Windham County Court to life imprisonment for arson causing death. The order stayed the release for thirty days to enable the State to take steps for a new trial. When the State determined to appeal, the judge granted it a certificate of probable cause and directed that Brown be placed in the custody of the United States Marshal and that he be released in $5,000 bail.

The record does not support the district judge's finding of jury prejudice. The Vermont courts afforded Brown all the rights of review to which he was constitutionally entitled in view of his failure to file a timely appeal in accordance with the Vermont statute, and thus we find no constitutional error in the denial of full appeal under the circumstances. Accordingly, we reverse the order of the district court and direct that bail be revoked and that Brown be returned to the warden.

On December 26, 1958, shortly after 9 P.M., a fire started in a ground floor drugstore at 14 Elliot Street in Brattleboro, which store was managed and controlled by Brown. Smoke spread rapidly to the rest of the building. One Lyman Streeter, who resided in a third floor apartment above the store, was carried from the building and died within a few minutes. According to the State's evidence at the trial death was caused by asphyxiation from inhaling smoke. There was also evidence that Brown left the building an instant before smoke and fire were seen coming from the store. Seven months after the fire, on July 23, 1959, Brown was indicted for arson resulting in Lyman

Streeter's death, a capital offense under the Vermont statutes. 13 Vt. Stat. Ann. §501.

On July 27 Brown appeared in the County Court for arraignment, accompanied by Mr. Burgess, who has been one of his counsel ever since. After the court had set the trial for September 15, Brown's counsel moved that he be admitted to bail, a matter which is discretionary in capital cases under Vermont law. Dr. David Ruml, a Brattleboro physician, testified that in January Brown had had a coronary condition, that two months before the hearing he had had a heart attack and that his detention in jail would create additional tension. The Deputy Attorney General,[1] Mr. Debevoise, on cross-examination asked the doctor whether it would make any difference in his opinion if he knew that Brown had been "previously arrested and incarcerated on the following convictions." Objection was made to this question by Mr. Burgess and counsel argued the propriety of the question. At this point the judge raised the question of prejudice, resulting in the following colloquy:

> "Court: What do you say about the element of prejudice?
>
> Mr. Debevoise: I think the Court can order the Courtroom cleared but I believe this is pertinent to the inquiry under discussion which is whether or not bail should be granted in the Court's discretion and the respondent in his applicated [sic] is started off with an opinion by the doctor based on medical reasons. The State should have an opportunity to see if the doctor has all the facts regarding the background.
>
> Court: Why don't you simply ask whether without skirting the element of prejudice?

[1] The State's Attorney, Ernest W. Gibson III, had disqualified himself as he was clerk of the corporation of which Brown was principal stockholder and manager.

Mr. Debevoise: You mean without mentioning specific crimes?

Court: Yes

Q. Would it make any difference in your opinion, Doctor, if it were the fact that on thirty-six different occasions this respondent has been charged with at least one crime?

Mr. Burgess: We again object. We don't see the relativity of what somebody has been charged with on the doctor's medical opinion.

Court: We will take the answer. You may have an exception.

A. No, I don't think it would.

Q. It is six weeks between now and trial, about six weeks. Would it make any difference to your opinion if the respondent on at least eight different occasions spent periods of time longer than six weeks in jail? A. No. I believe this man being in jail, this is an anxiety producing state. I think it is a greater anxiety producing state than being out on bail. This man has a serious heart condition and I think anything which jeopardizes his life should be avoided if possible."

Mr. Burgess made no application to clear the courtroom and made no objection whatever to the proceedings which followed the Deputy Attorney General's suggestion that the courtroom could be cleared. During further colloquy it appeared that the criminal record referred to covered the years 1928 to 1944 when Brown was in Boston. Brown's criminal record was also offered as relevant to the likelihood of flight. The details of the record were not made public and were not published or broadcast. At the conclusion of the hearing the judge ordered Brown committed to the custody of the Sheriff without bail.

The next day, July 28, the Brattleboro Daily Reformer published a front-page lead article under a one column headline reading "Brown Held For Arson Trial in Sept.," with the sub-heading "Bail Denied by Court; Record of 36 Arrests Cited." The account was factual and restrained and accurately related what had occurred at the public proceedings in the County Court at Newfane the day before. After three preliminary paragraphs the account continued:

> "On the matter of bail the respondent's request to be heard was granted on the grounds that even in a capital crime it is left to the discretion of the judge. Dr. David Ruml of Brattleboro testified that he had treated Brown for an acute coronary condition in December or January and for an acute heart attack about two months ago. He said that the emotional tension which might bring on another attack would be lessened if Brown were allowed to be free on bail.
>
> Deputy Atty. Gen. Debevoise asked Dr. Ruml [sic] he would change his opinion if he knew that the respondent had been charged on 36 different occasions with at least one crime and had been sentenced at least eight times to serve longer than six weeks in jail in Massachusetts, according to his Boston criminal record between 1928 and 1944.
>
> Debevoise stated that the only issue was the likelihood of flight, and considering Brown's background his release on bail was not feasible.
>
> Judge Leonard W. Morrison denied bail in view of the fact that Brown is charged with a crime punishable by death."

On September 4, 1959 Brown moved, pursuant to 13 Vt. Stat. Ann. §4631, for his removal to and trial in another county on the ground that there existed in Windham County such prejudice against him that a fair and impartial trial could not be had. Major reliance was placed upon the dis-

closure of Brown's criminal record in the July 28 article, but certain other newspaper, radio and television reports were also referred to and set forth as exhibits. The moving papers pointed out what was regarded as prejudicial in these other reports, as follows;

> "[S]ome of the news stories as published in the Brattleboro Daily Reformer set forth, among other things, that 'Brown drove up to the police station in a blue Cadillac convertible.'
>
> It has also been stated in news stories that the arrest of the respondent 'followed a long investigation by the State Fire Marshal's office,' and further that State Pathologist Richard S. Woodruff 'of Burlington 'reported his findings that Streeter's death was caused by smoke inhalation.' "

The most recent news report referred to was that relating to the bail hearing in the Reformer on July 28, and no other reports have been referred to at any stage in these proceedings. It is apparently undisputed that the news media carrying these stories have a very substantial audience in Windham County.

On October 1 the court heard the motion and took testimony thereon. The only witness called to establish the existence of prejudice was A. Luke Crispe, counsel for the previous owners of the drugstore who had taken the store back on foreclosure and who admittedly would be in a better position to collect on the insurance if Brown was acquitted. While Mr. Crispe gave his opinion that the publicity had definitely created prejudice against Brown, he also stated categorically that he was not saying that Brown could not get a fair trial in the county. On October 8 Judge Sylvester denied Brown's motion, stating that he found nothing inflammatory or denunciatory in the newspaper articles. Regarding the radio spot newcasts he said that these appeared to be "nothing more than a dissemination of a normal news topic of more than average interest to the inhabitants of

Windham County to be sure but still a news account and so utilized by the radio station."

On the afternoon of October 26, after the denial of several preliminary motions, including another motion for a change of venue, the court commenced the selection of the jury, which continued on the following day and concluded on the morning of October 28 after twelve jurors and two alternates had been chosen. Of the forty-seven prospective jurors examined, twenty-one were excused for cause on the motion of the State and three by the court of its own motion. The defendant exercised his full six peremptory challenges, and in addition challenged three persons for cause, all of whom were excused. Although Brown's counsel now attack the conduct of the *voir dire* (in respects to be discussed later), at the conclusion of the examination they stated that they were "content" with the jurors chosen. No motion for a continuance was made at any stage of the proceedings.

The trial proceeded and ended on November 5 with a verdict of guilty; on November 24 Brown was sentenced to life imprisonment according to the jury's recommendation. His subsequent motions for a new trial and for judgment notwithstanding the verdict were denied.

Although Brown indicated his intention to appeal immediately after sentencing, and permission to do *in forma pauperis* was granted by the Vermont Supreme Court on December 15, Brown's counsel failed to satisfy the requirements of the Vermont statute for timely proper filing of his notice of appeal. Under 12 Vt. Stat. Ann. §2383, filing was required within thirty days of Brown's official notification of the judgment, in this case, on or before January 4, 1960. 12 Vt. Stat. Ann. §2382 then required "the filing of a notice of appeal as hereinafter set forth with (1) the clerk of the court appealed to and (2) the clerk or register of the tribunal appealed from. * * *" Brown's counsel made a timely filing with the clerk of the general term of the

Supreme Court, but did no more until after the January 4 deadline had passed. The Supreme Court held, by a 3 to 2 vote, that it was compelled to dismiss the appeal for lack of jurisdiction, noting that Brown's counsel had not only improperly filed his notice with the clerk of the general term instead of the Windham County clerk, who was clerk of the Supreme Court for Windham County, but also had totally failed to give notice to the clerk of the court appealed *from*, as was clearly required by the statute. The court declined to rest its decision on the first of these defects, but held the second fatal. 121 Vt. 496, 160 A. 2d 879 (May 3, 1960). The court went on to state that it was its view that in thus being denied the right to appeal, Brown "has not been deprived of due process." *Id.* at 466, 160 A. 2d at 883.

Brown still had available to him under Vermont procedure the remedy of a petition to the Supreme Court for a new trial, and indeed he had already filed such a petition on May 1, 1960. The petition raised again the question of jury prejudice, asserted the existence of newly discovered evidence, and stated that "in the event this Honorable Court dismisses the appeal previously filed with it, the petitioner will be deprived of judicial review of this trial on a capital offense through mistake of law on the part of counsel. * * *" The court dismissed the petition on September 6, 1960. 122 Vt. 59, 163 A. 2d 845. In so doing, it took account of the fact that after the conviction a jury in civil actions brought in federal court against four fire insurance companies by The Harry Soffer Drug Co., of which Brown no longer had control, had determined that the first was not incendiary in origin.[2] Although it did not

[2] Suit for $70,000 for fire loss was brought against Centennial Insurance Co. of New York, Standard Fire Insurance Co. of Connecticut and Seaboard Fire & Marine Insurance Co. of New York. The jury awarded $38,000. Suit for $15,000 lost business was brought against Twin City Fire Insurance Co. of Minnesota and the jury awarded $3,275. The suits were tried together before Judge Foley.

pass specifically upon any claims of substantive error at Brown's trial, the Supreme Court did conclude that "We fail to find that any injustice was suffered by this petitioner upon trial, nor does it appear to us that the result would be changed if another trial was to be had." 122 Vt. at —, 163 A. 2d at 850. It noted that not all the witnesses were the same in the civil as in the criminal trial, and that the contexts in which the issue of the origin of the fire was raised differed. The Supreme Court reconsidered the entire issue of jury prejudice, and rejected the claim that Brown "received an unfair and partial trial. * * *" It also again rejected the claim of an unfair denial of the right to appeal. After this decision, Brown sought certiorari in the United States Supreme Court, which was denied on February 20, 1961. 365 U. S. 822.

On July 18, 1961, Brown petitioned the United States District Court for the District of Vermont for a writ of habeas corpus. Judge Gibson then disqualified himself[3] and Judge Timbers was designated to sit and hearings commenced on July 27. Judge Timbers took no testimony during the hearings. On December 22, 1961 he filed a lengthy opinion granting the writ, 200 F. Supp. 885-943, and on January 12, 1962, he granted the State a certificate of probable cause for appeal and admitted Brown to Bail.

Exhaustion of State Remedies—We agree with Judge Timbers that Brown sufficiently exhausted his Vermont remedies to give the federal district court jurisdiction to entertain his petition as to both the federal claims asserted —that he was unconstitutionally deprived of a fair trial by indifferent jurors and denied state appellate review. These claims were both considered by the Vermont Supreme Court on the petition for a new trial, and certiorari

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[3] Judge Gibson disqualified himself as his eldest son was counsel for the plaintiff in the civil action against the insurance companies, and his second son was an attorney practicing with John S. Burgess who filed the petition.

to that court was unsuccessfully sought in the United States Supreme Court. *Brown* v. *Allen*, 344 U. S. 443 (1953); see *Irvin* v. *Dowd*, 359 U. S. 394 (1959). Thus we pass to the merits of the two constitutional claims which Judge Timbers held well-founded.

1. *Denial of a fair trial by a panel of indifferent jurors*—Judge Timbers' conclusion that Brown had been denied his right to trial by an impartial jury was compounded of several elements. First he condemned the Deputy Attorney General's disclosure of Brown's criminal record at the public bail hearing, stating that it had a "devastating effect—alone and in combination with other factors—upon petitioner's chances for a fair trial by a panel of indifferent jurors . . . ." While Brown's criminal record was relevant on the matter of bail, and the actual incarcerations may have had some slight relevance to Dr. Ruml's testimony, we think a prosecutor should take every precaution to see to it that such information does not become public through any act of his unless the objections or actions of the defendant or his counsel make it impossible to have such information brought to the judge's or the witness's attention in any way short of public disclosure. Cf. *Delaney* v. *United States*, 199 F. 2d 107, 113-14 (1 Cir. 1952). But any charge of prosecution impropriety in making this prejudicial information available to the press is very much weakened by the fact, disclosed by the portion of the transcript we have quoted above, that the Deputy Attorney General suggested that the courtroom might be cleared before the details of Brown's record were brought out. Since Brown's counsel failed to take up this suggestion, responsibility for what later happened, when the Deputy Attorney General gave further particulars and went beyond arrest and incarceration to include mere charges of crime, is shared by defense counsel.

Judge Timbers found that the publicity given to the disclosure of Brown's criminal record, taken together with

the other publicity set forth in that portion of Brown's petition for a change of venue which we have quoted above in our statement of the facts, constituted "saturation coverage of the community with stories about the fire, petitioner's complicity in the alleged crime and the State's investigation of the crime." He concluded, relying primarily upon the Supreme Court's decision on the merits in *Irvin* v. *Dowd*, 366 U. S. 717 (1961), that the resulting prejudice against Brown, as reflected in the *voir dire* examination of jurors, was so great that it was impossible for Brown to receive a fair trial by impartial jurors in Windham County. He found the prejudice to be compounded by certain aspects of the conduct of the *voir dire* examination.

We agree with Judge Timbers that the principle clearly stated by the Supreme Court in *Irvin* v. *Dowd*, 366 U. S. at 723, required a *de novo* examination by him of the *voir dire* testimony to determine whether the jurors who convicted Brown lacked that impartiality which the Fourteenth Amendment requires. The district judge took no testimony and as there were no issues of credibility we are in as good a position as he to determine what inferences should be drawn from the admitted facts. Cf. *Orvis* v. *Higgins*, 180 F. 2d 537 (2 Cir.), cert. denied, 340 U. S. 810 (1950). But on our own examination of the *voir dire* transcript as well as the testimony and exhibits pertaining to the motions for a change of venue, we find so little support for his conclusions that we must reject as clearly erroneous his conclusion that Brown was tried by a prejudiced jury. Brown fell far short of meeting the requirement recently reiterated by the Supreme Court in *Beck* v. *Washington*, 369 U. S. 541, 558 (1962) "that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality." In finding that the jury was not impartial, the district judge indulged in just such forbidden speculation, and we must set aside his order.

The Supreme Court's recent decision in *Beck* v. *Washington, supra,* makes it clear that the mere fact that jurors have been exposed to adverse publicity does not prove their lack of impartiality where "each indicated that he was not biased, that he had formed no opinion as to petitioner's guilt which would require evidence to remove, and that he would enter the trial with an open mind disregarding anything he had read on the case." Although a majority of Brown's jurors indicated that they had seen or heard some of the news reports concerning the case, they similarly disclaimed any prejudice or partiality, as Judge Timbers' opinion recognizes. We do not agree with Judge Timbers that this is a case, like *Irvin* v. *Dowd, supra,* where the circumstances require that little weight be given to the jurors subjective professions of impartiality. Rather, this is a case like *Beck* v. *Washington, supra,* where

> "We cannot say the pretrial publicity was so intensive and extensive or the examination of the entire panel revealed such prejudice that a court could not believe the answers of the jurors and would be compelled to find bias or preformed opinion as a matter of law. Compare *Irvin* v. *Dowd, supra,* at 723-728, where sensational publicity adverse to the accused permeated the small town in which he was tried, the *voir dire* examination indicated that 90% of 370 prospective jurors and two thirds of those seated on the jury had an opinion as to guilt, and the accussed unsuccessfully challenged for cause several persons accepted on the jury. The fact that petitioner did not challenge for cause any of the jurors so selected is strong evidence that he was convinced the jurors were not biased and had not formed any opinions as to his guilt." 369 U. S. at 557-58.

Here, as in *Beck*, the publicity was not contemporaneous with the trial; the last news of which Brown complains appeared on July 28, three full months before the beginning

of the trial, and the indications are that none of the jurors had any clear recollection of what the reports had said. See *Stroble* v. *California*, 343 U. S. 181, 191-195 (1952). No effort was ever made, in contrast to *Beck's* case, to have the trial continued until community feeling should subside. Although Windham County is a small community in comparison with Seattle, Washington, the intensity of the publicity here was far less than that concerning Beck. No evidence, other than the conclusory testimony of the interested lawyer Crispe at the change-of-venue hearing, was ever presented to suggest that the Windham County community was permeated with deep and bitter prejudice against Brown, and we see no reason to believe that it was. Indeed, apart from the question of Brown's criminal record which we discuss below, if such routine reporting of the circumstances of a crime and the resulting investigations and proceedings can be said to make impossible a fair trial in the county three months later by jurors selected with the care exercised by the Vermont trial court, it is difficult to see how any important criminal case could ever proceed to trial in the county where the alleged crime was committed.

Although, as we have stated, the *voir dire* transcript indicates that no juror had any clear recollection of the contents of any of the newspaper, radio, or television reports concerning Brown, it is possible that some of the jurors might have remembered that Brown had a criminal record; this was, of course, a matter that could not be investigated on the *voir dire* examination because of the certainty of increasing prejudice to Brown. If this had been a federal trial and jurors had admitted to reading contemporaneous reports of a defendant's criminal record, our supervisory power over the administration of federal justice would compel us to reverse. *Marshall* v. *United States*, 360 U.S. 310 (1959). But the mere possibility that such information, made public three months prior to trial, might have remained in the minds of one or more of those

who eventually became jurors in the case is not in itself sufficient to raise a *constitutional* infirmity in Brown's conviction under the due process clauses of the Fourteenth Amendment. Furthermore, although this subject could not practically have been explored on the *voir dire* examination, there was no reason why testimony as to the extent of public gossip over Brown's criminal record, if such there was, could not have been offered at the change-of-venue hearing, or, indeed, in the federal habeas corpus proceeding. No such evidence was offered.

Judge Timbers found that various occurrences during the course of the *voir dire* examination further prejudiced Brown in such a way as to give additional support to his conclusion that the jury which ultimately tried the case was not impartial. We find no substance in these arguments. First, Judge Timbers disapproved of the procedure whereby a certain number of prospective jurors, including some who actually sat, were present during the questioning of others who were ultimately excused. With respect to this, it is sufficient to note that the procedure followed was specifically requested by Brown's counsel at the beginning of the proceeding. Moreover, we find nothing in what transpired during the questioning of the jurors which could have induced prejudice in any juror who heard it; the mere awareness that some of their fellows had such prejudice as to require that they be excused cannot realistically be said to disqualify the jurors finally selected. We also see no justification for the inference of prejudice from the fact that certain of the prospective jurors who were ultimately excused for cause were earlier permitted to associate with those who were later chosen.

Nor do we agree that the fact that some of the jurors had had casual dealings with either the deceased or the defendant was any source of prejudice. Indeed, the record indicates that many of the jurors were also known to defense counsel. Brattleboro is that kind of town and

Windham County is that kind of county. In 1960 Brattleboro had 11,522 people and Windham County had 29,776. The defendant had run a drugstore in Brattleboro and the deceased had been a barber in Brattleboro for many years. Of course they were both known to many of the people in the county and to many of the jury panel. It has never been supposed that mere acquaintance with those involved in a criminal case was by itself a disqualification for jury duty. If any such doctrine prevailed it would be impossible in many parts of this country to secure a jury in the county where the alleged crime has been committed.

Judge Timbers also indicated disapproval of the questions asked of the prospective jurors by the prosecutor. We find no possible prejudice in the fact that the prosecutor asked some of the prospective jurors whether they had read or remembered news reports mentioning the fire or connecting Brown with it. The questions were surely relevant, and could not have been more carefully phrased to avoid informing or reminding the jurors of any improper matter. They could not be interpreted to communicate anything more than that there had been reports of the fire and that some had mentioned Brown, and they served the commendable purpose of attempting to ascertain whether any of the jurors had developed preconceived notions of guilt from anything they had read or heard. Indeed Brown's counsel used virtually the same language in questioning other talesmen about the publicity. Equally beside the point are the adversions of the district judge to the State's inquiry into moral scruples concerning capital punishment. In neither of these respects did Brown's counsel raise any objection to the State's questions at any point in the *voir dire* proceedings.

Our examination of the record relating to the selection of the jury discloses no unfairness or likelihood of prejudice. Brown's counsel were given every latitude in questioning, and, in the words of the Vermont Supreme Court, "each

prospective juror was ably and exhaustively examined for indications of prejudice by the two experienced counsel for the petitioner.'"[4] 122 Vt. at 163 A. 2d at 850. The court was liberal in excusing prospective jurors for cause, and no juror sat who had been challenged by the defense. We find no support for the district judge's conclusion that "the fountain of justice was poisoned before it began to flow."[5]

2. *Denial of state appellate review*—Judge Timbers held that "denial of state appellate review of petitioner's conviction * * *—following denial of a fair trial by a panel of indifferent jurors—was so unreasonable and so discriminatory as to constitute denial of due process and equal protection in violation of the Fourteenth Amendment." Since we have held that there was in fact no denial of Brown's constitutional rights at trial in any respect of which he has complained, whatever support Judge Timbers' view might have drawn from his belief that the trial was unfair is eliminated. His decision that Brown was unconstitutionally deprived of the right to appeal was, however, based more explicitly on two interrelated elements: (1) his own deter-

[4] Both of Brown's counsel at the *voir dire* proceedings, who have continued to represent him, are former State's Attorneys, and one had also been a Superior Judge.

[5] Counsel also challenged the array of jurors on the ground that on the list of jurors there appeared no names of persons of the Jewish faith or race although there were a considerable number of such persons residing within the county. He made no offer of proof, and the court overruled this challenge. Judge Timbers did not rule upon the constitutional question raised in this respect on the habeas corpus petition. There was no evidence that any of the jurors had anti-Jewish prejudice. Indeed Mrs. Allen who sat on the jury not only denied being affected by any possible prejudice but said she then had a Jewish friend staying with her for two weeks. Other jurors made similar responses. We also find no substantial federal question raised by various other claims made by Brown's counsel in the district court but not pressed on this appeal, claims which Judge Timbers refused to consider for apparently the same reason.

mination that the actions of Brown's counsel in communicating with various Supreme Court personnel concerning permission to file a notice of appeal *in forma pauperis* and in sending the actual notice of appeal to the clerk of the general term "constituted substantial compliance with the notice of appeal requirement of the Vermont statute," and (2) his conclusion that applying the Vermont statute literally was so harsh as to be unconstitutional, since its double-filing requirement was "unique" among the states, was confusing, was new, having been enacted only in 1959, Acts of 1959, No. 261, §46, and was subsequently eliminated, Acts of 1961, No. 181, §1, apparently in reaction to the decision in *Brown's* case, which also was the apparent cause of an amendment making the filing of a notice of appeal entirely unnecessary in cases of sentences to death or life imprisonment. Acts of 1961, No. 181, §2, 12 Vt. Stat. Ann. §2383 (Supp. 1961).

Insofar as Judge Timbers' opinion suggests that the Vermont Supreme Court misinterpreted its own statute, neglecting possibly analogous decisions under the federal rules regarding criminal appeals, it is totally irrelevant to any proper decision on the habeas corpus petition. The highest court of Vermont, albeit by a 3-to-2 vote, has decided in a carefully reasoned opinion that Brown failed to comply with the Vermont appeal statute, and a federal court's review of that decision is limited to a determination whether the statute in itself or as applied was so harsh as to violate those principles of due process imposed upon the states by the federal Constitution. Since there is no showing that Brown was treated any differently from any other appellant, there can be no serious charge that he was denied the equal protection of the laws. Compare *Griffin* v. *Illinois*, 351 U. S. 12 (1956).

However harsh it may seem that Brown should have been deprived of state appellate review on a technicality, the law clearly laid down by the Supreme Court of the

United States in *Daniels* v. *Allen*, decided *sub nom. Brown* v. *Allen*, 344 U. S. 443, 482-87 (1952) requires us to reverse Judge Timbers' decision that the Vermont statute as applied to Brown was unconstitutional. Although *Daniels* v. *Allen* dealt with the necessity of exhausting state appellate remedies as a prerequisite to federal habeas corpus jurisdiction, it reached the question whether the dismissal of Daniels' state appeal had been unconstitutional, and squarely held that a state may constitutionally hold a criminal appellant to literal compliance with clearly stated technical requirements for appeal. "The state furnished an adequate and easily-compiled-with method of appeal . . . We cannot say that North Carolina's action in refusing review after failure to perfect the case on appeal violates the Federal Constitution." 344 U. S. at 485-86. The majority did not accept the argument of the three dissenting justices, 344 U.S. at 557-58, that the state court's failure to exercise its discretionary power to allow the appeal was so arbitrary as to be unconstitutional.

In *Daniels* v. *Allen*, the Supreme Court held that it was not unconstitutional for Daniels to be deprived of all consideration of serious constitutional claims, because his statement on appeal was delivered to the prosecutor's office on a Saturday rather than before the close of business the day before, although it would have been timely if mailed on Friday (thus being delivered on Saturday or later) and in any event would not have been acted upon until the prosecutor returned on Monday. 344 U.S. at 553, 557. Brown, on the other hand, has never attempted to raise any constitutional issue which has not been fully considered, even assuming that his appeal would have raised substantial issues of state law. The deficiencies in Brown's filing were no more technical than those in Daniels', if as much so. Cf. *United States* v. *Robinson*, 361 U.S. 220 (1961).

We cannot agree with Judge Timbers that there is anything confusing in the wording of the 12 Vt. Stat. Ann. § 2382 requiring "the filing of a notice of appeal * * * with * * * (2) the clerk or register of the tribunal appealed from. * * *" Nor can we accept his attempt to distinguish *Daniels* v. *Allen* on the grounds that in the case at bar the defense partially complied with the statute during the period for filing and that in this and other ways the defense had informally expressed its intention to appeal. *Daniels* v. *Allen* makes it clear that it is constitutional for a state to require literal compliance with reasonable rules whether or not failure to comply makes any practical difference under the circumstances or not. That in fact Brown's failure did make some practical difference is made clear by the fact that the trial court had already issued its mittimus before it received the notice of appeal. We see no significance in the fact that the clear requirements of the statute were relatively new and were subsequently eliminated. There is nothing in *Griffin* v. *Illinois*, 351 U.S. 12 (1956), which induces us to alter our interpretation of *Daniels* v. *Allen*.

From a study of the record, including a reading of the minutes of the trial, it seems to us unlikely that there was any substantial claim of error in the conduct of the State trial. Moreover, there was ample evidence to sustain Brown's conviction. We fully agree with the conclusion of the Vermont Supreme Court when it said in its opinion on the new-trial motion, "We fail to find that any injustice was suffered by this petitioner upon trial * * *" 122 Vt. at ——, 163 A.2d at 850. Even the dissenting member of the court agreed that "there is no demonstration that the result reached at the time was against good conscience * * *" 122 Vt. at ——, 163 A.2d at 851.*

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*Nor are we persuaded by the fact that the federal civil jury brought in verdicts totalling $41,275 against four insurance companies on claims totalling $85,000 and that it found that the fire

The district court is directed forthwith to revoke the order admitting Brown to bail and to direct the United States marshal to deliver Brown to the custody of the Warden of the Vermont State Prison. We direct our mandate to issue forthwith.

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was not of incendiary origin. At least three witnesses who testified at Brown's trial for the State did not testify at the civil trial. The most important of these was Rosario Amato who died before the civil trial. Amato saw Brown come out of the store and drive away and a moment later he saw smoke coming from the front of the store. Brown himself did not testify at either trial.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of July, one thousand nine hundred and sixty-two.

Present: Hon. J. Edward Lumbard, *Chief Judge*, Hon. Sterry R. Waterman, Hon. Henry J. Friendly, *Circuit Judges*.

UNITED STATES EX REL. FRANK BROWN, *Relator-Appellee*,

v.

ROBERT G. SMITH, Warden, Vermont State Prison, and STATE OF VERMONT, *Respondents-Appellants*.

Appeal from the United States District Court for the District of Vermont.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it is hereby reversed and that said District Court be and it hereby is directed forthwith to revoke the order admitting the appellant Frank Brown to bail and to direct the United States Marshal to deliver said appellant to the custody of the Warden of the Vermont State Prison, in accordance with the opinion of this court, with costs to the appellant.

A. DANIEL FUSARO, *Clerk*

A true copy.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 351—September Term, 1961.

(Petition for rehearing in Banc
Submitted August 1, 1962 Decided October 1, 1962)

Docket No. 27418

UNITED STATES OF AMERICA, *ex rel.* FRANK BROWN,
Petitioner-Appellee,

v.

ROBERT G. SMITH, Warden, Vermont State Prison,
Respondent-Appellant

PETITION FOR REHEARING IN BANC

Before:

LUMBARD, *Chief Judge,*
CLARK, WATERMAN, MOORE, FRIENDLY, SMITH,
KAUFMAN, HAYS and MARSHALL,

Circuit Judges.

JOHN S. BURGESS, Brattleboro, Vermont, *for petitioner-appellee.*

PER CURIAM:

All of the active judges concurring, except Judge Clark and Judge Smith who vote to grant, the petition for rehearing in banc is denied.

Judges Clark and Smith dissent and vote for rehearing in banc so that the full bench may review the entire record in this case, particularly the effect on the possibility of a fair trial of the prosecution's revelation to the press of the defendant's prior criminal record.

APPENDIX C

District Court's Memorandum Regarding Petitioner's Motion For Stay of District Court's Order Entered on Mandate of Court of Appeals

1. The mandate of the Court of Appeals (Exhibit A) dated July 17, 1962 was received by the clerk of the District Court on July 19, 1962 and on the same day the clerk forwarded a copy of the mandate to the undersigned in New Haven.

2. The undersigned immediately prepared an order (Exhibit B) to be entered on the mandate of the Court of Appeals and forwarded the same to the clerk of the District Court where the said order was entered July 23, 1962.

3. On the same day, July 23, 1962, petitioner filed in the District Court a motion (Exhibit C) for stay of the District Court's order of July 23, 1962 pending proceedings in the Court of Appeals on petitioner's petition for rehearing in banc.

4. Respondent's response (Exhibit D) dated July 24, 1962 to petitioner's motion for a stay was received by the undersigned on July 27, 1962.

5. Petitioner's motion for a stay was filed in the District Court, rather than in the Court of Appeals, because the mandate of the Court of Appeals had issued; no case was pending in the Court of Appeals; and the only case pending was in the District Court.

6. Petitioner's motion is essentially one for continuation of his bail pending disposition by the Court of Appeals of petitioner's petition for rehearing in banc. The District Court so treats petitioner's motion.

7. Since petitioner's motion, but for the issuance of the mandate, normally would have been made in the Court of Appeals in connection with his petition for rehearing in

banc, the District Court believes the motion appropriately should be acted upon by the Court of Appeals. Accordingly, by order entered herewith, the motion is respectfully referred to the Court of Appeals.

8. Inasmuch as petitioner's motion seeks continuation of his bail which the District Court granted after hearing on January 12, 1962, the following findings relevant to the issue of bail are made, based on the hearing before the undersigned on January 12, 1962 (200 F. Supp. 941-943) as well as all proceedings in this matter before the undersigned during the past year, that is, since July 27, 1961:

(i) Petitioner is 57 years of age.

(ii) He has had a history of coronary and acute heart failure attacks.

(iii) When he was indicted in the Windham County Court in July 1959, although petitioner was then out of the State of Vermont, he voluntarily returned to the state immediately and surrendered.

(iv) He originally was released in $7500 bail by the Windham County Court in July 1959. Subsequently that court held him without bail.

(v) With the exception of the conviction out of which the instant habeas corpus proceeding arose, petitioner's record is clear for a period of more than 20 years (200 F. Supp. 895, n. 34).

(vi) Throughout the habeas corpus proceedings in the District Court which commenced July 27, 1961, one year ago today, petitioner, who was present at all hearings, demeaned himself uprightly, punctually and according to law.

(vii) The District Court admitted petitioner to $5,000 bail on January 12, 1962, pursuant to Rule 8(3) of the Rules of the Court of Appeals for the Second Circuit (adopting Rule 49(3) of the Rules of the United

States Supreme Court). *United States ex rel. Poetsu* v. *Watkins*, 164 F.2d 457, 460 (2 Cir. 1947); see *Johnston* v. *Marsh*, 227 F.2d 528, 531, 56 A.L.R. 2d 661 (3 Cir. 1955) and Judge Hastie's concurring opinion at 532.

(viii) In accordance with Vermont practice, where professional bondsmen are not recognized, the District Court approved as sureties on petitioner's $5,000 bail bond, his two attorneys: Hon. Henry F. Black (former Vermont Superior Judge and former State's Attorney) and Hon. John S. Burgess (former State's Attorney).

(ix) During the period of more than six months that petitioner has been at liberty on bail, he has fully complied with the conditions of his bond.

(x) Based upon petitioner's demeanor throughout this habeas corpus proceeding and upon all facts disclosed by the record herein, in the opinion of the undersigned, petitioner in the matter of bail is worthy of trust.

9. On July 24, 1962, upon receipt of petitioner's motion for a stay, the undersigned telephoned Hon. Charles J. Adams, Attorney General of Vermont, to inform him of my intention respectfully to refer petitioner's motion to the Court of Appeals for its consideration in connection with petitioner's petition for rehearing in banc and to inquire whether the Attorney General had any objection to petitioner's remaining at liberty on bail until the Court of Appeals could act on the said motion and petition. The Attorney General informed the undersigned that, without waiving any of his rights, he had no objection.

Dated at New Haven, Connecticut, this 27th day of July, 1962.

WM R. TIMBERS
William H. Timbers
United States District Judge
Sitting by Designation

Order on Petitioner's Motion For Stay

Petitioner, pending proceedings in the Court of Appeals on petitioner's petition for rehearing in banc, having filed on July 23, 1962 a motion (Exhibit C) for stay of the District Court's order of July 23, 1962 (Exhibit B) entered upon the mandate of the Court of Appeals dated July 17, 1962 (Exhibit A); respondent having filed a response (Exhibit D) dated July 24, 1962 to petitioner's motion for a stay; and the District Court, treating petitioner's motion as one for continuation of his bail pending disposition by the Court of Appeals of petitioner's petition for rehearing in banc, having filed a memorandum (Exhibit E) regarding said motion; it is

ORDERED that petitioner's motion be, and the same hereby is, respectfully referred to the United States Court of Appeals for the Second Circuit.

Dated at Brattleboro, Vermont, this 30th day of July, 1962.

WM. H. TIMBERS
William H. Timbers
United States District Judge
Sitting by Designation

APPENDIX D

Motion to Recall Mandate and Stay Reissuance Pending Application For A Writ of Certiorari to the Supreme Court of the United States

The motion is granted provided that within thirty days the petitioner-appellee makes application for certiorari to the Supreme Court in accordance with the provisions of Rule 28(c) of the Rules of this Court.

J. EDWARD LUMBARD
STERRY R. WATERMAN
HENRY J. FRIENDLY
U.S.C.J.J.

8 October 1962

APPENDIX E

Order

UPON CONSIDERATION of the application of counsel for the petitioner, and respondent having no objection thereto,

IT IS ORDERED that the issuance of the mandate of the United States Court of Appeals for the Second Circuit be, and the same is hereby, stayed pending the timely filing and disposition of a petition for writ of certiorari providing such petition is filed on or before December 8, 1962.

Should the petition for writ of certiorari be denied, this stay is to terminate automatically. In the event the petition for writ of certiorari is granted, this stay is to remain in effect pending the issuance of the judgment of this Court.

(S) JOHN M. HARLAN
Associate Justice of the Supreme
Court of the United States

Dated this 8th day of November, 1962.

A true copy JOHN F. DAVIS
Test:

Clerk of the Supreme Court
of the United States
By E. P. CULLINAN, Chief Deputy